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IN THE
COURT OF APPEALS OF INDIANA

RANDAL S. BURKHART,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 65A04-0408-CR-457
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0403-FB-19

May 26, 2005

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Randal S. Burkhart appeals his convictions for Possession of Methamphetamine, as a Class D felony, and Maintaining a Common Nuisance, a Class D felony, following a jury trial. He presents the following issues for our review:

1. Whether the search warrant used to obtain evidence in this case was invalid due to the omission of certain facts from the probable cause affidavit.

2. Whether Burkhart's rights under Pirtle v. State were violated when he gave sheriff's deputies oral consent to search.

3. Whether sheriff's deputies exceeded their authority when they executed the search warrant.

We affirm.[1]

FACTS AND PROCEDURAL HISTORY

On March 3, 2004, Posey County Sheriff's Deputies John Montgomery and Thomas Latham went to Randal Burkhart's residence on Skunks Run Road in Posey County to execute an arrest warrant on him.[2] Someone at the residence told the deputies that Burkhart could be found in his body shop, which was located in a barn on the premises. When the deputies knocked on the barn door, Burkhart invited them to enter. Once inside, the deputies served the warrant and arrested Burkhart. They then conducted a protective sweep. Burkhart's friend Boaz Price was also present.

[1] We heard oral argument in this case on May 5, 2005, at Brown County High School in Nashville. We thank the Brown County Bar Association for its hospitality and the attorneys for their fine arguments.

[2] The Posey Circuit Court had issued a bench warrant authorizing the deputies to arrest Burkhart and bring him before the court, after he had failed to appear in court on a civil matter.

The deputies had smelled the odor of ether when they approached the outside of the barn. Then, during the protective sweep, they observed a mason jar containing a clear liquid believed to be paint thinner and engine degreaser cans with holes punched in them. Based upon those observations, which suggested that methamphetamine might be manufactured there, the deputies asked Burkhart to give them consent to search the premises. Burkhart initially gave his oral consent for the search, but when the deputies asked him to sign a written consent to search form, he refused. In the interim, the deputies had discovered a few lithium battery packages in a garbage bag, and, following a pat-down search of Price, they found a baggie containing a substance that appeared to be methamphetamine in his pocket. Accordingly, the deputies sought a search warrant for the barn.

In his probable cause affidavit, Deputy Montgomery stated that he had smelled the odor of ether outside of the barn; that he had found a mason jar containing what appeared to be paint thinner inside a compression room within the barn; that he had found a baggie containing what appeared to be methamphetamine in Price's pocket; that, after obtaining Burkhart's oral permission to search the premises, he found empty packages for lithium batteries in a garbage bag; and that the deputies saw in plain view cans of engine degreaser with punch holes in them. In addition, Deputy Montgomery stated that in 2000, Burkhart was convicted of manufacturing methamphetamine, possession of chemical reagents or precursors with intent to manufacture methamphetamine, and possession of methamphetamine. Finally, Deputy Montgomery stated that ether, lithium

metal, and organic solvents[3] are used in the manufacture of methamphetamine. The trial court then found that there was sufficient probable cause to support a search warrant and issued a warrant granting the deputies permission to search Burkhart's residence and outbuildings, including the barn, and vehicles found on the premises.

When sheriff's deputies executed the search warrant, they seized the following items, which can be used in the manufacture of methamphetamine: bottles of Heet, which contains methyl alcohol; cold medicine; a can of de-icer; a jar containing methyl alcohol; empty packages of lithium batteries; empty cans of engine degreaser with punch holes in them; a bottle of Liquid Fire; latex gloves; a receipt for the purchase of lithium batteries; a portable air tank with an altered valve; and a can containing ether. In addition, the deputies found .05 grams of methamphetamine. Kenneth Rose, supervisor of the Posey County Narcotics Unit and an expert in methamphetamine labs, concluded that there was an active methamphetamine lab operating in the barn.

The State charged Burkhart with dealing in methamphetamine, possession of chemical reagents or precursors with intent to manufacture, possession of methamphetamine, possession of marijuana, and maintaining a common nuisance. Burkhart moved to suppress the evidence obtained pursuant to the search warrant, claiming that the deputies violated his rights under the federal and state constitutions when they executed the search warrant and that there was insufficient probable cause to support the warrant. The trial court granted Burkhart's motion with regard to evidence recovered from his mobile home, including marijuana, but denied his motion with regard

[3] Deputy Montgomery also explained that engine degreaser is an organic solvent.

to all other evidence. Thereafter, the State dismissed the charges for possession of chemical reagents or precursors and possession of marijuana. At the conclusion of the trial, a jury found Burkhart guilty of possession of methamphetamine and maintaining a common nuisance, but acquitted him of dealing in methamphetamine. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Although Burkhart originally challenged the admission of the evidence through a motion to suppress, he appeals following a completed trial and challenges the admission of such evidence at trial. "Thus, the issue is . . . appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We have indicated that our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. Ackerman v. State, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), trans. denied. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), trans. denied. However, we must also consider the uncontested evidence favorable to the defendant. See id.

Issue One: Probable Cause

Burkhart first contends that because Deputy Montgomery failed to disclose in his probable cause affidavit that the place to be searched was a body shop, the search warrant was invalid. In particular, Burkhart maintains that the omitted information would have

explained the presence of items such as paint thinner and engine degreaser, which are commonly found in body shops. Burkhart asserts that had the trial court been given this complete information, the court would not have issued the search warrant.

The test we apply here is "whether the totality of circumstances presented to the magistrate justified the issuance of the warrant[]." Johnson v. State, 472 N.E.2d 892, 900 (Ind. 1985). Clearly deliberate falsehood or misrepresentation by police officers making such affidavits will not be tolerated and cannot form the basis for the issuance of arrest or search warrants. Id. Mistakes and inaccuracies of facts stated in the affidavit, however, will not vitiate the reliability of the affidavits by the magistrate so long as it is also determined that such mistakes were innocently made. Id.

In support of his contention, Burkhart cites to three opinions where Indiana courts held that search warrants were invalid because the facts supporting the probable cause affidavits were either "stale" or "at variance with the truth." See Brief of Appellant at 10-11. In Query v. State, 745 N.E.2d 769, 770 (Ind. 2001), our supreme court held that "where the State learns that a material fact establishing the probable cause underlying a search warrant is incorrect, the State is obliged to inform the issuing magistrate of the new facts and, if it fails to do so, the warrant is per se invalid." In Dolliver v. State, 598 N.E.2d 525, 528 (Ind. 1992), where a police officer submitted a probable cause affidavit based upon an anonymous tipster's hearsay and which grossly misrepresesnted the tipster's reliability and the information he had provided, our supreme court held that the search warrant was invalid. And in State v. Haines, 774 N.E.2d 984, 990 (Ind. Ct. App. 2002), this court held that evidence that drugs had been sold at a residence "two to six

weeks" prior to a probable cause hearing was stale and was, therefore, insufficient to support a probable cause determination.

But each of the opinions upon which Burkhart relies is distinguishable from the instant case. Burkhart has not demonstrated that any of the facts supporting the probable cause affidavit were stale, untrue, incorrect, or based upon hearsay. Instead, Burkhart contends that the information contained in the probable cause affidavit was incomplete. Burkhart maintains that the facts contained in the affidavit were misleading because they were not presented within the context of a body shop. But Burkhart does not allege that the omission was made deliberately.[4] As such, the omission does not vitiate the reliability of the affidavit. See Johnson, 472 N.E.2d at 900; see also State v. Busig, 81 P.3d 143, 147 (Wash. Ct. App. 2003) ("To invalidate a warrant for material omissions or misstatements, the accused must show deliberate material omissions or statements made in reckless disregard of the truth.").

Further, we are not persuaded that had the probable cause affidavit included the omitted fact the magistrate would have denied the request for the warrant. At the suppression hearing, the State presented evidence that the manner in which the degreaser cans had holes punched in them was consistent with manufacturing methamphetamine, as opposed to their use in a body shop. And despite the omission of any indication that the barn was being used as a body shop, the probable cause affidavit describes the premises as a "garage" and includes a reference to a "compressor room," which would commonly be found in a body shop. Finally, the same trial judge who issued the search warrant also

[4] Indeed, in his brief on appeal, Burkhart states that he "is not suggesting that Deputy Montgomery intentionally omitted these facts." Brief of Appellant at 12-13.

denied Burkhart's motion to suppress, which indicates that he did not think the omitted fact would have caused him to deny the warrant.[5] Burkhart has not demonstrated that the search warrant was invalid. We conclude that the trial court did not abuse its discretion when it admitted the evidence seized pursuant to the warrant.

Issue Two: Pirtle

Burkhart next contends that when the deputies asked for his consent to search the body shop, they did not first advise him of his right to an attorney, nor did they tell him that if he refused to consent that they would have to obtain a search warrant. Burkhart asserts that because he was not fully advised of those rights, see Pirtle v. State, 263 Ind. 16, 323 N.E.2d 634 (1975), the evidence found as a result of his oral consent to search should not have been used to support the search warrant.

But deputies only found empty lithium battery packages as a result of Burkhart's oral consent, and there was plenty of other evidence supporting the search warrant. Indeed, Burkhart acknowledges that the Pirtle violation, by itself, is harmless error. But he maintains that that violation, in combination with the omission of the fact of the body shop from the probable cause affidavit, "further undermines the existence of probable cause to support the search warrant." Brief of Appellant at 14. We cannot agree.

We conclude that the evidence cited by Deputy Montgomery in his affidavit was sufficient to establish probable cause for the search warrant, even excluding the lithium

[5] The State also contends, in the alternative, that the degreaser cans "were admissible with or without the warrant" because they were in plain view when the deputies served the warrant on Burkhart. Id. at 8. But Burkhart correctly points out that the plain view doctrine requires that items in plain view be seized immediately. See Middleton v. State, 714 N.E.2d 1099, 1101 (Ind. 1999). The deputies did not seize the degreaser cans at the same time they served the warrant on Burkhart. Rather, they seized those items only after they had obtained the search warrant. As such, the State's contention must fail.

batteries and despite the omission of a reference to the body shop. Thus, we hold that any error was harmless. See Ind. Trial Rule 61 (stating court must disregard "any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Issue Three: Search Warrant

Burkhart finally contends that the deputies exceeded the scope of the search warrant when they searched the area surrounding the body shop, in particular, three receptacles sitting outside of the barn. Burkhart points out that the search warrant authorized deputies to "enter into" the structures and vehicles located on his property. Brief of Appellant at 14; Appellant's App. at 425. Thus, he maintains, the items deputies found outside of the barn should not have been seized.

Burkhart concedes that under the Fourth Amendment, officers are authorized to search the areas within the curtilage of places expressly listed in a search warrant. See Sowers v. State, 724 N.E.2d 588, 590 (Ind. 2000). But Burkhart asserts that such an extension of the authority granted in a search warrant would be precluded under Article I, Section 11 of the Indiana Constitution, the purpose of which is to protect from unreasonable police activity those areas of life that Hoosiers regard as private. See Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995).

The State maintains that under the circumstances in this case, the same reasons for authorizing the seizure of items found outside of the barn under the Fourth Amendment apply under Article I, Section 11. We must agree. In Sowers, police obtained a warrant authorizing them to search the defendant's "residence" at a specific address, and our supreme court held that the warrant also authorized the officers to search a tent in the

backyard of the residence. 724 N.E.2d at 590-91. The court explained that the officers had not exceeded the scope of the warrant under either the Fourth Amendment or Article I, Section 11 of the Indiana Constitution. Id. at 591-92.

Burkhart attempts to distinguish Sowers because the search warrant in that case expressly authorized officers to seize items "believed to be concealed 'in or about'" the defendant's dwelling. Id. at 592. But, in holding that the search did not violate Article I, Section 11, our supreme court stated that it was relying on the same reasoning underlying its Fourth Amendment analysis. And the court did not place any special emphasis on the inclusion of the phrase "in or about" in the search warrant to justify its holding under the Fourth Amendment. We are not persuaded that the holding in Sowers does not apply here. We hold that under these circumstances, it was reasonable under Article I, Section 11 of the Indiana Constitution for sheriff's deputies to search items located within the curtilage of Burkhart's barn.[6]

Affirmed.

MAY, J. and BAILEY, J., concur.

[6] Indeed, Burkhart cannot show that he had much of an expectation of privacy regarding the items sitting outside of the barn, since his body shop customers had access to them.